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Pierce Atwood LLP 160 Federal Street 10th Floor Boston MA 02110 **MAILED** 

APR 272010

**OFFICE OF PETITIONS** 

In re Patent No. 7,475,428

: DECISION ON REQUEST

Smith, et al.

: FOR

Issue Date: January 6, 2009

: RECONSIDERATION OF

Application No. 10/600,738

PATENT TERM ADJUSTMENT

Filed: June 20, 2003

: and

Atty Docket No.BSIL-0116US

: NOTICE OF INTENT TO ISSUE : CERTIFICATE OF CORRECTION

This is a decision on the petition filed on March 4, 2009, which is being treated as a petition under 37 CFR 1.705(d) requesting that the patent term adjustment indicated on the above-identified patent be corrected to indicate that the term of the above-identified patent is extended or adjusted by one thousand, one hundred and forty (1,140) days.

The petition to correct the patent term adjustment indicated on the above-identified patent to indicate that the term of the above-identified patent is extended or adjusted by one thousand seventy-seven (1,077) days is GRANTED to the extent indicated herein.

As the period from the filing date of the request for continued examination (RCE) to the issue date of the patent is not included in the "B" delay period, the over three year period begins on June 21, 2006, and ends on August 11, 2008, the day before the RCE was filed, and is 783 (not 784) days. See 35 U.S.C. 154(b)(1)(B)(i).

It is noted that patentees failed to account for the filing of the notice of appeal on January 29, 2008. The Office reminds patentees that the period consumed by appellate review, whether successful or not, is excluded from the calculation of B delay. See 35 U.S.C. 154(b)(1)(B)(ii). In this instance, the period consumed by appellate review is 195 days, beginning on the date on which the notice of appeal to the Board of Patent Appeals and Interferences was filed, January 29, 2008, and ending on the day before the Request for Continued Examination was filed, August 11, 2008. Thus, the B delay is 588 days (783 - 195). Accordingly, the patent term adjustment is 1,077 days (677 days of A delay + 588 days of B delay - 0 days of overlap - 188 days of applicant delay).

The Office will sua sponte issue a certificate of correction. Pursuant to 37 CFR 1.322, the Office will not issue a certificate of correction without first providing assignee or patentee an opportunity to be heard. Accordingly, patentees are given one (1) month or thirty (30) days, whichever is longer, from the mail date of this decision to respond. No extensions of time will be granted under § 1.136.

The Office acknowledges submission of the \$200.00 fee set forth in 37 CFR 1.18(e). No additional fees are required.

The application is being forwarded to the Certificates of Corrections Branch for issuance of a certificate of correction. The Office will issue a certificate of correction indicating that the term of the above-identified patent is extended or adjusted by one thousand seventy-seven (1,077) days.

Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3222.

Kenya A. McLaughlin Petitions Attorney

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Office of Petitions

Enclosure: Copy of DRAFT Certificate of Correction

<sup>1</sup> The relevant period of "B" delay for determining periods of overlap began January 1, 2007, and ended August 11, 2008. The period of "A" delay began December 27, 2004, and ended November 3, 2006. Accordingly, there are no overlapping periods of delay between "A" delay and "B" delay.

## **DRAFT COPY**

## UNITED STATES PATENT AND TRADEMARK OFFICE

## **CERTIFICATE OF CORRECTION**

**PATENT** 

: 7,475,428 B2

DATED

: Jan. 6, 2009

INVENTOR(S): Smith et al.

It is certified that error appears in the above-identified patent and that said Letters Patent is hereby corrected as shown below:

On the cover page,

[\*] Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 USC 154(b) by (596) days

Delete the phrase "by 596 days" and insert – by 1,077 days--